No. 15,611

United States Court of Appeals

For the Ninth Circuit

HARRY L. MARSHALL, JR.,
Appellant,

vs.

WESTFAL-LARSEN & CO., GENERAL STEAMSHIP COMPANY and BJARNE SELLEVOLD,
Appellees.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

I. JURISDICTION.

Since this is a suit in admiralty by libelant, who was a passenger on respondent's vessel, to recover damages for injuries which were suffered by him while disembarking from the vessel and which were caused by respondent's negligence, the District Court had jurisdiction. U.S. Const. 3, Sec. 2, Cl. 1; 28 U.S.C.A., Sec. 1333; *The Admiral Peoples,* 295 U.S. 649, 55 S.Ct. 885; 2 C.J.S. Admiralty, Sec. 3, p. 64; Sec. 59, p. 114; and Sec. 62, pp. 121-123.

The libel "in a cause of contract and damage, civil and maritime" (R 3) alleges the facts stated in the next preceding paragraph and then alleges that "the

matters herein alleged are within the admiralty and maritime jurisdiction of the United States and this Honorable Court'' (R 5); and respondent by its answer admits this allegation. (R 8.)

This court has jurisdiction of this appeal under 28 U.S.C.A. Sec. 1292.

II. BRIEF STATEMENT OF THE CASE.

Libelant, Marshall, a man sixty-one years of age, as a passenger, boarded respondent's vessel, Hardanger, at Los Angeles on December 28, 1954 for a voyage down the west coast of South America, through the Straits of Magellan and up the east coast. He was injured on February 1, 1955, while disembarking at Corral, Chile. The ship had stopped at nine places on the west coast of South America before it arrived at Corral, and when it did its passengers would go ashore for sightseeing. At many of these stops the ship did not tie up to a pier, but anchored in the harbor; and the passengers would go ashore in a shore boat, being helped into the boat by an officer or member of the crew standing on the lower platform of the gangway and by the man in charge of the boat.

When the ship arrived at Corral it did not tie up to a pier, but anchored in the harbor. It was arranged between Marshall and the master of the ship, Sellevold, that they would go ashore together early in the morning of February 1. On that morning the gang-

way was rigged along the side of the ship. The lower platform of the gangway was about two to three feet above the deck of an empty barge which was being moved up and down two to three feet by the swell of the sea. The captain in effect directed Marshall to disembark by jumping unassisted from the lower platform of the gangway to the barge and by then walking across the barge to a shore boat on its other side. The captain went down the gangway behind Marshall. He did not jump down to the gangway before Marshall so that he could assist Marshall in descending; and although it had been the ship's practice to provide assistance to passengers disembarking from the vessel when anchored in a harbor, he took no steps to provide such assistance.

The barge was one hundred feet long and the lower platform of the gangway was opposite the forward end of the barge. When Marshall jumped, Nelson, a seaman, and Nordfonn, a deck boy, were on the barge, scraping and painting the ship. The respondent's witnesses contradicted one another as to where these men were on the barge, but their testimony, when considered together, establishes beyond any doubt that they were on the after end of the barge and that while Marshall and the captain were descending the gangway, Nordfonn was pulling on the rope that tied the after end of the barge to the ship, in order to bring the barge nearer the ship's side. The captain did not direct these men to assist Marshall; but when Marshall was about to jump, Nelson called to him not to jump. (The ironical fact is that a seaman, who had no duty

whatever with regard to Marshall's safety was seeking to safeguard him, whereas the captain, who was charged with the highest duty to protect him from harm, not only did nothing to safeguard him, but tacitly directed him to take the jump.) Marshall testified that he did not hear Nelson's warning; that if he had heard Nelson he would have asked the Captain, who was behind him, what to do; but that when he reached the lower platform of the gangway, he waited a moment for whatever directions the captain might want to give him; and that when the captain said nothing, he jumped and was pitched by the movement of the barge and, to save himself from being thrown down the empty forward hold of the barge, turned sharply injuring his knee severely.

The trial court found that (1) respondent did not fail "to furnish" Marshall with a safe means of disembarkment; (2) that respondent did not fail "to take reasonable means to safeguard" Marshall "while he was disembarking"; (3) that respondents did not fail to "provide sufficient officers and employees to superintend his disembarking"; (4) that Marshall's injuries were in no way caused "by any negligent act or omission of respondent, the Master or crew"; (5) that Marshall in disembarking had failed to exercise reasonable care and that the proximate cause of his injury was his own negligence; and (6) that Marshall is not entitled to recover any damages from respondent. (R 15-17.)

Some of these findings are found in the court's "Findings of Fact" and others in its "Conclusions of

Law." We shall, for convenience, refer to them all as "the court's conclusions."

The court also found that Marshall, in jumping from the lower platform of the gangway, disregarded Nelson's warning. (R 14.)

III. SPECIFICATIONS OF ERRORS.

Both the court's findings of specific facts and the facts established by the uncontradicted testimony show that its conclusions are clearly erroneous.

Both these findings and such testimony show that respondent failed (1) to furnish Marshall with a safe means of disembarking; (2) to take reasonable measures to safeguard Marshall while he was disembarking; (3) to supply sufficient officers and employees to superintend his disembarking; (4) that Marshall's injuries were caused by these negligent acts of respondent and its master; and (5) that Marshall did exercise reasonable care.

(6) Marshall's statement that he did not hear Nelson's warning is supported by the great weight of evidence and should be accepted as true; and therefore the court's finding that he disregarded the warning is clearly erroneous.

(7) But assuming for argument's sake that Marshall was negligent, he, under the admiralty doctrine of comparative negligence applicable to the case, is nevertheless entitled to recover not all of his damages, but the balance remaining after the amount al-

lowable to his fault shall have been deducted; and so the court's conclusion and judgment that he is not entitled to recover any damages is clearly erroneous.

IV. ARGUMENT.

A. THE LEGAL PRINCIPLES APPLICABLE TO THE CASE: RESPONDENT WAS UNDER A DUTY TO SUPPLY MARSHALL WITH A REASONABLY SAFE MEANS OF DISEMBARKING FROM THE SHIP; AND BOTH IT AND ITS MASTER, IN PERFORMING THIS DUTY, WERE OBLIGED TO EXERCISE THE HIGHEST DEGREE OF CARE.

There is no dispute about these principles; and so we need not dwell on them at any length.

In *Moore v. American Scantic Line,* 2 Cir., 121 F. 2d 767, a passenger of a steamer sued to recover damages for personal injuries sustained by him when he, while jumping rope on deck, stepped on an uneven portion of the deck and fell and hurt himself. The court said that although a carrier is not an insurer of the safety of its passengers, it does owe them "the duty to exercise a very high degree of care" for their safety; and a passenger is "entitled to have a carrier exercise for his safety as much skill, care, and prudence as an exceedingly competent and cautious man would bring to the task in like circumstances . . ."

The *Moore* case cites a leading case, *Pennsylvania Company v. Roy,* 102 U.S. 451, in which a passenger on a railroad was injured when an upper berth fell on and injured him. In the *Pennsylvania* case the court said:

> " . . . The carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men."

In *Voltmann v. United Fruit Co.,* 2 Cir., 147 F. 2d 514, where a passenger on a steamer was injured by the slipping of furniture in the lounge during a storm, the court said:

> "It was the duty of the master to protect him from harm with the care, skill and prudence which an 'exceedingly competent and cautious man would bring to the task in like circumstances'."

There are many cases stating and applying these principles. See also *The City of Panama,* 101 U.S. 453, 462-463; *Maibrunn v. Hamburg-American S.S. Co.,* 2 Cir., 77 F. 2d 304; *The Thessaloniki,* 2 Cir., 267 F. 67, certiorari denied 254 U.S. 649, 41 S. Ct. 63; *Kvart v. Swedish American Line,* 2 Cir., 126 F. 2d 279.

Another principle applicable to this case is stated in 80 C.J.S. 1118-1119, sec. 193c of Shipping, as follows:

> "It is the duty of a carrier of passengers by water to maintain at all proper times, a reasonably safe means for passengers to get on and off the vessel employed, and to provide employees to render such services as are necessary to get passengers safely aboard or on shore."

The carrier, as stated by this textwriter, must do two things: (1) it must provide a reasonably safe

means for passengers to get on and off the vessel; and (2) it must render such services as are necessary to get passengers safely aboard or on shore.

In *Burrows v. Lownsdale,* 9 Cir., 133 F. 250, the passenger, either from dizziness, or from the slipping of his foot, fell from a gangplank leading from the steamer to the dock. The plank was 10 feet long, 16 inches wide and 1 inch thick and had no railing, ropes or guards of any kind and was at an angle of about 30 degrees. The court said:

> " . . . Such a plank as that described, extending over the water at such an angle, without railing, ropes, or guards, is not a reasonably safe means of passage for man, woman, or child, of whatever age. The law made it the duty of the carrier to provide a reasonably safe means for discharging its passengers, and the failure of appellants in that regard in the instance in question rendered them clearly liable in damages."

In *Mawson v. Eagle Harbor Transportation Co.,* 148 Wash. 258, 268 Pac. 595, a case in which the facts were practically the same as those in the *Burrows* case, the court said:

> " . . . The use of a gangplank constructed as this was can hardly be said to be the exercise of that high degree of care to provide a reasonably safe means of ingress and egress which a public carrier owes to its passengers for hire. It surely requires no argument to establish the fact that an unguarded plank, set at an angle of 30 degrees, one end resting on the dock and the other on the

> ship and the use of which requires a passenger to walk down the incline and assume a stooping position to get upon the boat, is decidedly an unsafe method to present to the public for its use."

These two cases (the *Burrows* and the *Mawson* cases) are clearly analogous to the case at bar. It should make no difference whether the means provided by a ship to enable a passenger to disembark consists of walking a plank at an angle, and without ropes, or jumping two or three feet from the lower platform of a gangway onto a barge which is being moved up and down two or three feet by the swell of the sea and which is, therefore, a most unstable platform, capable, as shown by the facts in this case, of pitching a man jumping on it and thus causing him to fall. It requires no argument to show that such a jump is just as unsafe a method of getting off a ship as walking planks like those used in the *Burrows* and *Mawson* cases. And when a ship in effect directs a passenger to use such a method of disembarking it is not exercising that high degree of care to protect him from harm which the law imposes on it; on the contrary it is grossly negligent.

In *The Ocracoke,* 159 Fed. 552 (D.C. Va.), a passenger saw four other passengers get off a ship which was in the act of landing at a wharf, by stepping from the ship onto the wharf without waiting for a gangboard to be put out. On being advised that a gangboard was not to be put out, he also stepped off, but lost his balance and was thrown from the wharf and seriously injured. The court, in holding the respond-

ent liable and that appellant was not guilty of any contributory negligence, said, at page 554:

> "The conclusion reached by the court upon this whole evidence is that the libelant is entitled to recover for the injuries sustained; that as a passenger upon this steamer, he had the right to assume under the circumstances that this was the place of landing at Newport News; and that the respondent utterly failed to take due and proper care to provide for the passenger landing from the steamer, by the employment of proper employees to render such services, either in the matter of informing passengers as to the place of landing or making a safe landing, and, on the contrary, by the course of conduct of its employees, and the sole representative that was then engaged in the double purpose of making fast the ship and landing passengers *invited and caused the libelant to alight* [italics ours] as other passengers had done immediately preceding."

The proposition held by this court, therefore, is that where a vessel furnishes a passenger a means of disembarking, it in effect invites or directs the passenger to use it; and the passenger is not guilty of negligence in using it, even though it may not be safe. This proposition, which is certainly apposite in this case, is implied but not explicitly stated in the *Burrows* and *Mawson* cases; in *The Ocracoke* it is stated explicitly.

When a passenger is furnished a means of disembarking, he is not under any duty to order other or better means, or to order assistance in their use.

But the obligation to furnish safe means and assistance rests on the vessel; and it, and particularly its master, should perform these duties with the high degree of care the law imposes on it; that is, it should perform them with the "skill, care and prudence" which "an exceedingly competent and cautious man would bring to the task."

It is not the law—it simply cannot be the law—that a vessel may furnish a passenger with an unsafe means of disembarking and then maintain that his use of it was negligent. Such a rule would completely abrogate the salutary principle that a vessel must exercise the highest degree of care to protect its passengers from harm.

B. THE FINDINGS THEMSELVES DO NOT SUPPORT THE JUDGMENT BUT SHOW THAT RESPONDENT IS LIABLE TO MARSHALL.

The findings contain only a partial and abridged statement of the facts; and so we should first state certain undisputed and preliminary facts established by the evidence, but not stated in the findings, so that the facts actually found by the court shall appear in their true setting.

The facts we will state in this paragraph are established by Marshall's testimony. They are uncontradicted. Marshall boarded the steamship Hardanger, a freighter able to carry twelve passengers (R 42), at Los Angeles on December 18, 1954, for a voyage down the west coast of South America through the

Straits of Magellan and back the east coast. (R. 36.) The steamer arrived at Corral, Chile, where the accident occurred, on January 29, 1955, and stayed there until February 3, 1955. (R. 26, 51.) (Since all the dates to which we shall refer hereafter occurred in 1955, we in stating a date shall not refer to the year.) Prior to arriving at Corral, the steamer stopped for periods of from one to four days at nine South American ports. Corral was its tenth stop. (R. 37.) It did not dock at a pier at seven of these ten ports, but anchored in the harbor. (R 52-54; 63-64.) When the ship would arrive at one of these ports, normally six or eight passengers would go ashore for sight seeing (R. 53-54; 64); but sometimes only one or two would go ashore. (R 67.) When the ship was not tied up to a pier, but was anchored in a harbor, the ship would make arrangements for a shore boat to come out to it to take the passengers ashore. (R 53-54.) The shore boat which took Marshall ashore at Corral on the morning of the accident tied up to a barge which lay alongside the ship. On those occasions on which passengers went ashore prior to the arrival of the steamer at Corral, the shore boat which took them ashore would not tie up to a barge as it did at Corral on the morning of the accident, but the passengers went directly from the gangway into the shore boat. (R 53-54.) On these prior occasions, an officer, or a seaman, of the ship would be on the lower platform of the gangway to help the passengers from the lower platform into the shore boat and the man in charge of the boat would be there to take hold of a passenger

as he left the lower platform and help him into the boat. (R 54-55.)

(Three of respondent's witnesses, the first officer, Kaldefoss, the Captain Sellevold, and Nordfonn, who at the time of the accident was a deck boy, testified by depositions which were read and then admitted in evidence as respondent's exhibits B, C and E respectively (R. 102, 116). We shall cite the testimony of each of these witnesses by giving the initial of his surname followed by the letter D; for example, we shall cite the testimony of Kaldefoss by the initials KD.)

Kaldefoss testified that when the ship was not tied up to a pier, but was anchored in a harbor, and passengers were leaving it to go ashore, the usual practice was for somebody from the ship to help passengers from the lower platform of the gangway to the shore boat. (KD 27.)

When the steamer stopped at Corral on January 29th, she did not dock at a pier, but anchored in the harbor. (R 38.)

On the evening of January 31st, Marshall had a conversation with the captain of the vessel, Sellevold, in which the captain told Marshall that early the next morning he was going from Corral up the Valdivia River about eight or ten miles to see an agent of his company. Marshall then indicated that he might like to go with the captain on the trip; and the captain invited him to go; and it was then arranged that they should have an early breakfast together at 7 o'clock

on the following morning and would then go ashore. (R 38-39.)

Pursuant to this arrangement, Marshall and the captain breakfasted together on the morning of February 1st. Marshall then told the captain that he would meet him on deck and went to his cabin for a few minutes. When he arrived on deck about 7:30 in the morning, he found the captain talking to the first officer, Kaldefoss, at the head of the gangway. (R 40.)

At the time of the accident Marshall was sixty-one years of age (R 56); and at that time the captain knew Marshall's age. (R 56; SD 21-22.)

Having stated these preliminary and undisputed facts, we can now quote the statement of specific facts contained in the findings which, as we have stated, do not support, but on the contrary, contradict, the conclusions which the court drew from them.

The court found:

> " . . . During the early morning of said day [February 1] Libelant and the Master, Bjarne Sellevold, left said vessel to go ashore via a small tug. At the time of disembarking the gangway of said vessel was so rigged as to permit access to a barge on the portside of said vessel. In order to reach the shore tug it was necessary to descend said gangway to the barge and cross the barge to the tug.
>
> "At the time the weather was clear and dry. There was a swell to the sea and therefore the barge was moving up and down under said gangway from two to three feet. Libelant was aware of these conditions.

"As Libelant descended the gangway the Captain was behind him. Mr. Nordfonn and Mr. Nilsen, two seamen, from the vessel were on the barge engaged in scraping and painting the side of the vessel. Assistance was available to Libelant in reaching the barge, if he wished it. When Libelant reached the lower platform of said gangway Mr. Nilsen called to him 'Don't jump.' Libelant disregarded said warning and jumped from the gangway platform to the barge, while said barge was rising on a swell and before it had reached its crest.

"Libelant jumped at right angles to the vessel and in a direction across the barge, but when he landed he was at an angle somewhat facing the hold. He was then pitched by the movement of the barge to his left. Libelant in order to avoid being thrown down the forward hold of the barge turned sharply twisting his left knee and sustained injuries to his left knee consisting of a tear of the anterior cruciate ligament. He proceeded across the barge to the tug with the Captain and went ashore where he received medical attention. Libelant then returned to the vessel." (R 14-15.)

On the basis of these findings (which we have called the findings of specific facts) the court concluded (1) that respondent had performed its duty (a duty which it was required to perform with the highest degree of care) to furnish Marshall with a safe means of disembarking, to safeguard him while disembarking, and to provide efficient and careful men to supervise his disembarking, and (2) that the sole cause of Marshall's injuries was his own negligence.

1. Our first point under this head is that the findings of specific facts themselves show that respondent did not perform this duty; that is, they show that respondent did not furnish Marshall with a safe means of disembarking and did not safeguard him while disembarking and provide efficient and careful men to supervise his disembarking; and so these findings themselves, without the aid of any evidence, deny the court's conclusion that respondent performed this duty.

The court found that it was necessary for Marshall, in order to disembark, "to descend the gangway to the barge and cross the barge to the tug." It did not find how far the lower platform of the gangway was above the deck of the barge; in other words, it did not find how far Marshall was obliged to jump to get from the lower platform to the barge. We shall have to look to the evidence to supply this fact. But it did find that "There was a swell to the sea and therefore the barge was moving up and down under the gangway from two to three feet," and also that when Marshall landed on the barge, "he was then pitched" by its "movement to the left," and that he "in order to avoid being thrown down the forward hold of the barge turned sharply twisting" and injuring his knee. The court, therefore, found that Marshall was obliged to jump from the lower platform of the gangway to a barge being moved up and down by the sea two to three feet and that he was pitched by the movement of the barge and injured.

A barge being moved about by the sea in this manner is a very unstable platform on which to jump. It can pitch and throw down a man (particularly a man who is not experienced in the ways of the sea) who jumps onto it; and as found by the court, it did pitch and injure Marshall. It might, as implied by the court's findings, have pitched him down the forward hold of the barge and severely injured or killed him.

When, therefore, the court found that respondent furnished Marshall this means of disembarking, it found in effect, positively and definitely, that respondent had not furnished Marshall with a safe means of disembarking.

The next question, therefore, is what do the findings show with respect to the measures taken by respondent to safeguard Marshall while he was disembarking and to provide efficient and careful officers and men to superintend his disembarking.

The court found that "as Libelant descended the gangway, the captain was behind him"; and also that "Mr. Nordfonn and Mr. Nilsen (sic), two seamen, from the vessel were on the barge engaged in scraping and painting the side of the vessel;" and that "Assistance was available to Libelant in reaching the barge, if he wished it."

It did not find that the captain got down onto the barge before Marshall jumped to assist Marshall in descending; or that he ordered Nelson and Nordfonn

to so assist Marshall; or that he took any steps whatever to safeguard Marshall. We can, therefore, infer from the findings that the respondent did none of these things; and as we will later show, the evidence shows without contradiction that respondent did none of them.

All that the court found that has a bearing on this point is that "Assistance was available to Libelant if he had wished it." The question is not what Marshall wished; but whether respondent performed its duty of safeguarding him, when he made his jump which proved to be dangerous, by providing competent men to assist him in getting onto the barge. The findings show that respondent completely neglected to perform this duty.

And so the court's findings of the facts themselves, without any reference to the evidence, show that respondent did not furnish Marshall with a safe means of disembarking and with competent assistance in disembarking; and so these findings negate its conclusion that respondent performed these duties.

2. This brings us to our second point under this head, that is, to the question whether the facts found by the court support its conclusion that the sole cause of Marshall's injuries was his own negligence.

Our first answer to this question is that the findings which we have already reviewed demonstrate that respondent did not perform its duty which we have just been considering, and that such failure, if not the sole cause, was certainly a contributing cause of Marshall's

injuries; and so the facts as found by the court negate definitely and positively the court's conclusion that Marshall's alleged negligence was the sole cause of his injuries.

Since the admiralty doctrine of comparative negligence applies to the case and since as shown by the findings respondent's negligence contributed to Marshall's injuries, Marshall was entitled to recover at least a portion of his damages. We shall discuss this point later. The question here is what did the court find to support its conclusion that Marshall did not exercise reasonable care.

In this connection, we wish first to point out that Marshall had the right to disembark by the means which the vessel supplied him. As the court found, the captain was directly behind him as he descended the gangway. The captain was in effect directing Marshall to use the means which Marshall did use to disembark. Marshall, therefore, cannot be charged with negligence because he used such means. He could not issue orders; he could not order the captain to furnish him with a safe way of getting off the ship and with assistance in getting off.

It will be recalled that in the *Burrows* case (supra) the gangway consisted of a plank 10 feet long and 16 inches wide; that it had no railing, ropes or guards of any kind and was at an angle of about 30 degrees; and that the gangway in the *Mawson* case (supra) was practically the same. It will also be recalled that in *The Ocracoke* (supra) the passenger was injured by attempting to step, without a gangplank, directly from

the deck of the ship to the wharf when the ship was landing; and that in *The Ocracoke* the court pointed out that the ship had in effect "invited and caused" the passenger to try to get ashore in the way he used. The means of disembarking employed by the passengers in these cases were obviously not safe; but the passengers who were injured in using them were under no obligation to call on the vessel to supply better and safer means; but they had the right to use the means supplied them and could not be held guilty of negligence in using them. The same is true of Marshall; more true of Marshall than of the passengers in these cases because he was in effect acting at the direction of the captain who was the master of the ship and was charged with a special duty to protect him.

It would be a strange rule of law that would permit a ship (which is charged with the highest duty of care to protect its passengers from injury) to furnish its passengers with an unsafe means of embarking and disembarking and then to permit it to say to a passenger injured in using such means "It is true you were hurt in using the means supplied you to disembark, but you should have seen that these means were unsafe and so you can recover nothing for your injuries."

The court found that Marshall "was aware of these conditions"; that is, he was aware of the fact that, as found by the court, the barge was being moved by the swell of the sea "up and down under the gangway from two to three feet." Certainly he was aware of them. But he was not a seagoing man; and as we

shall point out later, he did not know how a barge being moved about by the sea could pitch a man. But the captain, who was directly behind Marshall, was aware of these conditions also; and being a seafaring man, he knew that the moving barge could pitch Marshall and injure him. But he did nothing, absolutely nothing, to safeguard Marshall.

The court found: "When Libelant reached the lower platform of said gangway Mr. Nilsen (sic) called to him 'don't jump.' Libelant disregarded said warning and jumped from the gangway platform to the barge, while said barge was rising on a swell and before it had reached its crest."

Marshall testified that he did not hear Nelson call this to him. We shall carefully review later the evidence bearing on the point in order to establish that the great weight of the evidence shows that the trial court should have believed Marshall and that, therefore, the court's finding that he ignored Nelson's warning is clearly erroneous.

But at this place we should say this respecting Nelson's warning. In the first place, assuming for argument's sake that Marshall heard it, the captain, who was behind Marshall, must have heard it also; and since the captain did not tell Marshall not to jump, Marshall, if he had heard the warning, would have had a right to assume that the captain was tacitly directing him to ignore it.

The second point relating to Nelson's warning which we believe we should mention here is this. As found by the court, Nelson was a seaman, who was on the

barge to scrape and paint the vessel. He owed no duty to protect Marshall; but he believed that it was so unsafe for Marshall to jump that he called to Marshall not to do so. If an ordinary seaman, who had no duty whatever with respect to Marshall, believed that it was not safe for him to make the jump, certainly the captain should have believed the same thing and should not have permitted Marshall to jump at least until either he or someone else was on the barge to assist Marshall in descending. Could anything make more clear how negligent, how grossly negligent, the captain was in the performance of the duty which the law imposed upon him to exercise the "skill, care and prudence" which "an exceedingly competent and cautious man" would have exercised to protect Marshall from harm?

We can conclude our argument under this head by saying that the court's findings themselves, without the aid of any evidence, demonstrate that respondent violated in a gross manner the duties it owed Marshall and that it should have been held liable for doing so.

C. THE EVIDENCE CONFIRMS WHAT IS SHOWN BY THE SPECIFIC FINDINGS OF THE COURT, THAT IS, THAT RESPONDENT VIOLATED THE DUTIES IT OWED MARSHALL AND SHOULD BE HELD LIABLE TO HIM.

In reviewing the testimony, let us follow the same method we used in considering the findings; let us first review the testimony confirming what is shown by the findings; that is, that respondent did not furnish Marshall with a safe means of disembarking and

did not protect him while he was disembarking by providing competent men to assist him in getting onto the barge; and then let us review the testimony bearing on the question whether Marshall himself failed to use reasonable care.

1. The uncontradicted evidence shows that respondent did not furnish Marshall with a safe means of disembarking and with assistance in disembarking.

As we have already pointed out, the record shows that when Marshall, pursuant to his arrangement with the captain, came out on deck at about 7:30 on the morning of February 1st, he found the captain and Kaldefoss, the first officer, together at the head of the gangway; that he then descended the gangway; and that the captain descended it behind him.

Kaldefoss testified:

"Q. Now, Mr. Kaldefoss, it is a fact, is it not, that when the gangplank is lowered onto a barge, as this gangplank was, the lower platform of the gangplank is always maintained rather high off the barge so that if there is a swell the sea will not raise the barge and strike the gangplank? That is correct, isn't it?

A. Yes.

Q. And so when this gangplank was lowered, it was lowered to such a position that it would be some distance or some height above the deck of the barge, so that the barge, when struck by a swell, would not strike the gangplank?

A. Yes." (KD 21.)

Kaldefoss also said that when Marshall descended the gangway, the lower platform of the gangway was about two or three feet above the deck of the barge

and that the barge was about a foot from the side of the ship (KD 10); and that at that time there were two men on the barge painting and scraping the ship, Nelson, an ordinary seaman, and Nordfonn, a deck boy (KD 12).

Kaldefoss also testified:

> "Q. Now, when you saw Mr. Marshall step onto the upper platform to go down the gangplank, did you say anything to the men from the ship working on the barge, telling them that a passenger was descending, and asking them to look after his descent from the lower platform to the deck of the barge?
>
> A. No.
>
> Q. Did the captain do anything of that sort?
>
> A. No." (KD 22.)

Marshall testified that the captain followed him down the steps of the gangway; that when he reached the lower platform of the gangway, the platform was two or three feet above the deck of the barge; that at that time there was a swell in the sea which was moving the empty barge up and down under the gangway from two to three feet (R 43-44); that when he reached the lower platform of the gangway, the captain said nothing to him and nothing was done to lower the gangway so that it would be nearer the deck of the barge (R 44); and that there was nobody from the ship on the barge to help him descend from the platform to the barge (R 50-51). He then testified:

> "Q. Now, you stood there on the lower platform of the gangplank in the position you have described, and what did you do then?

A. Well, I looked at the barge, and sort of subconsciously I wondered if the Captain was going to say anything. Nothing was said, so I assumed I was to jump, and I jumped and he jumped after me." (R 45.)

Later on he testified on cross-examination (we quote somewhat at length because of the importance of the testimony):

"Q. How far away was the Captain from you when you jumped?

A. I would say two to three steps up the gangplank.

Q. Two to three steps? Did you inquire of him or make any statement to him how you were expected to get off onto the barge?

A. No. I tarried a few seconds on the lower platform. The Captain was two or three steps behind me and no orders were given." (R 68.)

"Q. Now, when you came down the gangway that morning to board the barge, did you expect there would be somebody there to help you off the gangway?

A. Well, I came down the gangplank with the Captain, and I assumed that what we did would be with the approval of the Captain. If there wasn't anybody on the barge, I assumed he didn't want anybody on the barge. . . .

Mr. Gerhardt: All right. On page 21, line 25 [the reference is to Marshall's deposition] Mr. Marshall, I asked you, 'Now, did you expect there would be somebody at the end of the lower platform to assist you onto the barge?' And your answer was, 'That had always been customarily so, I mean on and off the ship there was always

somebody to help you when you went ashore, but I thought because of the earliness of the morning that one would have to accept the prevailing situation. There wasn't anybody there, and I thought because it was half past seven in the morning that they had failed to put somebody there.'

Is that right? Was that your answer?

A. Right." (R 66-67.)

"Q. Can you recall when you jumped whether the barge was on the way up on the swell or whether it was on the way down?

A. Well, that would be hard to recall exactly, but I think it was up-coming up.

Q. Coming up? And do you recall whether it had reached the peak of the swell?

A. No.

Q. It had not?

A. I do not recall that.

Q. What made you decide that that was the proper moment to jump?

A. Well, I had stood there a few seconds and it seemed to me it was a safe distance. *What I didn't understand or know is what a swell could do to you.*

Q. And in this particular instance—

A. (interposing): If there had been no swell, it would have been a safe jump.

Q. That is true, but you could see the swell, couldn't you?

A. Right." (R 71.)

Marshall then testified, as found in substance by the court, that he jumped from the lower platform at right angles to the ship and landed about a foot from the coaming rail of the forward hold of the barge. He

marked the place where he landed on the barge as "M-1" on exhibit 1 (the drawing to scale used at the trial, to which we shall refer later). (R 45-46.) He then testified:

> "Q. When you made that jump and lit on the deck, what happened then?
>
> A. Well, the instant I hit the deck I was pitched forward head down into the empty hold.
>
> Q. You were pitched to your left?
>
> A. Pitched to my left.
>
> Q. By the movement of the barge?
>
> A. That is correct.
>
> Q. And what did you do then?
>
> A. Well, I knew if I went down the hold I couldn't survive it, and I couldn't move my feet because the thing happened so fast, so I twisted my whole body to the right and in that way tore the ligaments out of my left leg." (R 46.)

He then went on to say that he fell on the deck of the barge on his hands and knees and got up immediately; that he did not know at that time that he had torn the ligaments of his knee; that he felt a dull pain, and rubbed his knee, but the acute pain came later when the blood collected in his knee (R 47); that after he picked himself up from the deck of the barge, he limped over to the little launch that was at the forward corner of the barge; that when he was there on the deck of the barge, or the shore boat, he could not remember which, the captain asked him if he was hurt and if he would like to go aboard the ship; that he replied that he did not know if he was hurt, but that as there was no doctor aboard, he believed he should go to Valdivia where there was a

doctor (R 47-48); that the captain and he went ashore in the small boat and took the ferry for Valdivia; that his knee kept getting bigger until it was the size of a large cauliflower; that when they got to Valdivia, he could not walk; that he was helped off the boat into an automobile and taken to a hospital where a surgeon aspirated the blood from his knee and put a cast on it; and that he and the captain then returned to the ship (R 49-50).

The facts established by this uncontradicted testimony are that the captain did not get down onto the barge before Marshall jumped to assist Marshall; that he did not order the two men on the barge to assist Marshall; that absolutely nothing was done to protect Marshall when he made the jump; that the captain in effect directed him to make it; that when Marshall jumped the two to three feet to the barge being moved up and down by the swell of the sea two or three feet, he was pitched by the movement of the barge and was obliged to turn sharply on his left leg to save himself from being thrown down the forward hold of the barge (which might have killed him) and in making this turn injured severely his knee; and that Marshall, not being a seagoing man, did not know "what a swell could do to" him, but the captain certainly did.

We need not repeat the arguments already made by us in considering the findings. It will suffice for us to say that the uncontradicted testimony confirms what the findings themselves show; that is, that the respondent and its master, not only did not exercise the "skill, care and prudence" which "an exceedingly

competent and cautious man'' would have exercised to protect Marshall from harm, but that it and he were grossly negligent in failing to furnish Marshall with a safe means of disembarking and in failing to provide competent men to assist him to disembark.

2. The uncontradicted evidence shows that Marshall exercised reasonable care; and the weight of the evidence shows that Marshall did not hear Nelson's warning and that, therefore, the court's finding that he ignored this warning is clearly erroneous.

We shall not repeat here the argument we made in discussing the findings that Marshall, like the passengers in the *Burrows, Mawson* and *Ocracoke* cases, had a right to use the means of disembarking which the captain was in effect directing him to use and that he was not guilty of negligence in disembarking in this way.

The admiralty rule is that on appeal there is a trial de novo; but that the appellate court will usually accept the findings of the trial court unless such findings are clearly "against the weight or preponderance of the evidence." 2 C.J.S. on Admiralty, Sec. 187, pp. 318-319; and Sec. 192, pp. 326-327; *The Andrea F. Luckenbach,* 9 Cir., 78 F. 2d 827.

It is our contention that the clear weight or preponderance of the evidence shows that this court should accept Marshall's testimony that he did not hear Nelson call to him, and that the finding of the trial court that Marshall ignored Nelson's warning is against the weight of the evidence and is clearly erroneous.

Marshall testified on cross-examination:

"Q. And as you were coming down the gangway you were naturally facing in a direction which would take in practically all the entire length of the barge on the side nearest to the vessel, is that correct?

A. Not necessarily. I think when you are going down a gangplank you look at your feet, and when you get to the platform, if you are going to jump at right angles, you look at right angles.

Q. Had there been somebody working in there in this area within twelve to fifteen feet of the bottom of the platform, do you think you would have seen them?

A. If I were looking that way I would certainly have seen them, yes.

Q. As you walk down a gangplank do you watch your feet every second?

A. I certainly do.

Q. And when you got to the bottom of the platform didn't you look at the entire barge to see what its movement was?

A. No, I was looking at the holds and I was looking back to see if the Captain was coming, and I decided the only way I could get on the barge would be to jump at right angles because if I jumped ahead of me the passage was too narrow.

Q. And you saw no one there?

A. I saw no one there.

Q. Did you have any conversation with anyone on the barge?

A. I had no conversation with anybody on the barge because I saw no one.

Q. Did anybody on the barge speak to you?

A. No one that I heard.

Q. Did anyone on the barge give you a warning not to jump?

A. If they had, I wouldn't have jumped. I would have asked the Captain.

Q. Had that warning been given, you would have waited?

A. I would have asked the Captain then.

Q. Without that warning, was there any reason for you to go ahead and jump without asking the Captain?

A. Oh, I don't think a passenger need ask a Captain or order a Captain. I think when he was two steps behind me if he didn't want me to jump he would have said so, or he would have said, 'Let me go ahead.' " (R 68, 69-70.)

It should be noted that neither Kaldefoss nor the captain testified that he heard Nelson call to Marshall not to jump. Since respondent did not seek to elicit that testimony from either Kaldefoss or the captain, we can infer that neither of them (Kaldefoss was at the head of the gangway and the captain behind Marshall) heard Nelson call. Since neither of them heard Nelson, why should Marshall, who had his mind fixed on the task of getting onto the barge, have heard him?

The end of the barge towards the bow of the ship was referred to in the testimony as "the forward part of the barge" and the end of the barge towards the stern of the ship was referred to in the testimony as "the after part of the barge." We shall refer to them in the same way.

Kaldefoss, the first officer, testified that the barge was about 100 feet long (KD 7); that it was about twenty-five feet wide (KD 22); that it had three holds (KD 8); that the length of each hold was about twenty feet (KD 22-23); that the holds were empty (KD 16); that each hold was surrounded by a wall about two feet high called a "coaming" (KD 10); that it was less than five feet from the side of each of the holds to the side of the barge (KD 22); and that the lower platform of the gangway was about two feet square (KD 25).

When upon the taking of their depositions Kaldefoss, Captain Sellevold and Nordfonn testified a rough drawing prepared by Kaldefoss (KD 7) was used to illustrate their testimony which was marked on the trial "Defendant's Exhibit A for identification." We shall refer to it simply as "Exhibit A." Kaldefoss' rough drawing did not purport to be drawn to scale. It shows, for example, the gangway much longer in relation to the ship and the barge than it should have been shown; and it does not show correctly the relation of the forward hold on the barge to the lower platform of the gangway.

Marshall and Nelson both testified at the trial. Their testimony was illustrated by a drawing which was marked "Plaintiff's exhibit 1 for identification" and will be referred to simply as "Exhibit 1" and which was drawn to a scale of one eighth of an inch to a foot and shows properly the relation of the gangway to the ship and the barge and the position of the barge.

Nelson, who was twenty-four years of age at the time of the accident and was an ordinary seaman and who testified in part by an interpreter (R 80), testified that when Marshall was on the lower platform of the gangway, he was standing on the barge painting and scraping the ship (R 80-81). He indicated his place on the barge by placing his initials "J N" on Exhibit 1 (the drawing to scale which was used at the trial) (R 81-82). Applying the scale of this drawing, his testimony was that he was standing on the barge about twenty feet from the lower platform of the gangway towards the after part of the barge.

He said that when he saw Marshall, Nordfonn was on the barge working with him; that Nordfonn was within a meter or a half a meter from him. (A meter is 39½ inches.) He indicated Nordfonn's position on the barge on Exhibit 1 by marking it "JN-3", a place which was right alongside his position J N (R 95).

Nelson then testified that when Marshall was on the lower platform of the gangway, he called to him "Don't jump"; but that Marshall did not answer him, but jumped and fell; and that he then ran forward to help Marshall, but that before he reached Marshall somebody was there to help him up. (R 83, 90-91.)

It was the captain who jumped onto the barge after Marshall, but Nelson said on direct examination that he could not remember who the man was (R 83). When he was asked, not once, but at least twice, on cross examination, whether or not the man he saw with Marshall was the captain, he replied that he

could not remember (R 88-89, 92-93); which showed an amazing lack of memory.

As we will state later, the captain testified that when he and Marshall were going down the gangway to its lower platform, one of the men on the barge (whom he could not recall definitely, but believed to be Nordfonn) was pulling on the rope that tied the after part of the barge to the ship in order to bring the barge closer to the ship, and that when Marshall was picking himself up he hollered to this man not to pull on the rope any longer, because he was afraid that the lower part of the gangway would strike Marshall as the barge was being brought in under the platform.

Nelson said that although he could recall his exact position on the barge when Marshall was descending the gangway (R 99), he could not recall that the captain shouted to him or Nordfonn to stop pulling on the line (R 96-97).

Nelson's testimony, therefore, was that when Marshall was on the lower platform of the gangway, he was on the barge painting and scraping the ship about twenty feet from the lower platform of the gangway; that Nordfonn was working a meter or half a meter from him; and that when he called to Marshall, the latter did not answer.

It will be recalled that Kaldefoss testified that when Marshall descended the gangway Nelson and Nordfonn were on the barge scraping and painting the ship (KD 9-12). He then testified:

"Q. Where were they in reference to the lower platform when Mr. Marshall got onto the barge?

A. One here, *maybe,* and one here (indicating)." (KD 15.)

He then indicated on exhibit A (his rough drawing which was not to scale) that one of them was at "K3" and the other at "K4" (KD 15). He did not say which of them was at K3 and which of them was at K4. The lower platform of the gangway was about opposite the forward coaming of the forward hold. Marshall so testified (R 45); and the court so found (R 14-15). Applying the scale on which Exhibit 1 was drawn (one eighth of an inch to the foot), the lower platform of the gangway was, therefore, about ten feet from the prow of the barge. K3, the place at which Kaldefoss placed one of the men, was a little forward of the middle of the barge, about opposite the forward coaming of the middle hold of the barge. Since, as Kaldefoss testified, the barge was one hundred feet long and since K3 was a little forward of the middle of the barge, the man at this point (who must have been Nelson) was (if Kaldefoss' vague indication of his position on the barge is accepted as evidence of where he stood) about forty-five feet from the prow of the barge, or about thirty-five feet from the lower platform of the gangway. K4, the place on Exhibit A at which Kaldefoss placed the other man was opposite a point a little aft of the forward coaming of the after hold of the barge and was about three-quarters of the distance back from the prow of

the barge, or about seventy-five feet from its prow, or about sixty-five feet from the lower platform.

Nordfonn, who testified by an interpreter (R 116) and who was a deck boy and eighteen years old at the time of the accident (ND 3), testified:

> "Q. Now, at Corral, Chile, in February of 1955, did you see an accident to a passenger who was leaving the vessel?
>
> A. Yes, not completely, but most of it.
>
> Q. Where were you located at the time?
>
> A. *I was on the after end of the barge.*" (ND 3.)

Nordfonn gave his deposition on the same day as Kaldefoss and after the latter had testified and had said that "maybe" the two men were at K3 and K4 without stating which of the two men was at each of these places.

After Nordfonn testified that he at the time of the accident was on the "after end of the barge," he said, in response to questions put to him by respondent's counsel, that he was a little aft of K4. As just stated, K4 was about seventy-five feet from the prow of the barge, or about sixty-five feet from the lower platform. We can assume that when Nordfonn testified that he was a little aft of this point, he meant five to ten feet aft of it; and that therefore he placed himself on the after part of the barge about sixty-five to seventy-five feet from the platform. Nordfonn, after saying that he was a little aft of K4, testified:

> "Q. Will you point to approximately where Mr. Nelson was located?

A. Right here.

Q. You are pointing to K-5?

A. *I can't say for sure, but it was somewhere in the vicinity where I put my finger.*" (ND 4.)

K5, the point on Exhibit A at which Nordfonn thus placed Nelson, was at about the middle of the barge about opposite the middle of the middle hold. Since the barge was one hundred feet long and since K5 was about at its middle, Nordfonn (by a designation which was as vague as that of Kaldefoss) placed Nelson about fifty feet from the prow of the barge, or about forty feet from the lower platform.

After Nordfonn had placed Nelson and himself on the barge, he testified that he saw Marshall come down the gangway (ND 5); that the captain was directly behind him (ND 10-11); and that neither the captain nor Kaldefoss spoke to either him or Nelson prior to the time Marshall jumped (ND 14). He also testified:

"Q. Did Mr. Nelson have any conversation with the passenger before he jumped?

A. As far as I remember, I think he said to him that he shouldn't jump.

Q. Did the passenger make any reply?

A. Yes sir. He said something. There was something said to the effect that it was O. K., and then he jumped." (ND 5.)

The contradictions in the testimony of respondent's witnesses became even more pronounced when we consider the captain's testimony.

The barge was made fast to the ship by lines from its forward and aft ends (KD 8-9).

The captain on his direct examination testified:

"Q. Were there any men on the barge besides Mr. Marshall?

A. The ordinary seaman Nelson and Nordfonn. The two of them.

Q. Where was Mr. Nelson on the barge?

A. *He was on the after end of the barge.*

Q. Where was Mr. Nordfonn?

A. *The two of them were back there.*" (SD 8.)

Then on cross-examination, he designated their place on the barge (he said it was their approximate position and that he could not be sure of it) at point "B" on Exhibit A, a point about opposite the after coaming of the after hold, or about ten to fifteen feet from the end of the barge. (SD 20.)

Later on cross-examination the captain testified:

"Q. Did you, at the time Mr. Marshall went down those stairs, did you know that there were two men from the ship on the barge?

A. Yes.

Q. Did you say anything to those two men on the barge?

A. Not as far as I can recollect.

Q. Now, Captain, there was—

A. Yes, I think I did. As far as I recall, one of them was putting his weight on the line. I think it was a little later. I said, 'Don't pull any more.'

Q. 'Don't pull any more'?

A. Yes.

Q. He was putting his weight on what line?

A. On the line from the barge to the deck there.

Q. While he was scraping, is that it?

A. He wasn't scraping then.

Q. What was he doing?

A. Well, so far as I can recall, he was just hanging on, putting his weight on the line so as to pull the barge in.

Q. Pull the barge in towards the ship?

A. Yes. . . .

A. I seem to recall when I hollered down not to pull any more that the gangway was over the deck, overlapping the deck of the barge. And that is why I asked him not pull any more.

Q. Where was the barge in relation to the ship?

A. Well, at the time I hollered, I seem to recollect that I hollered because it was getting under the gangplank. I mean under the platform, the lower platform of the gangway. So the gangway was overlapping the deck of the barge.

Q. That is, the lower platform of the gangway was partially over the deck of the barge at that time?

A. At the time I hollered.

Q. How much over, do you recall?

A. No. As far as I can recall, I hollered because I was worried about Mr. Marshall, that the gangway should touch him while he was down there.

Q. Were you worried about Mr. Marshall because the gangway might touch him? What do you mean by that?

A. I said it because I wanted to avoid that. . . .

A. Mr. Marshall was down by the hatch coaming there and the barge was coming in.

Q. In other words, Mr. Marshall was on the deck of the barge at the time you shouted?

A. On the deck of the barge or over the hatch coaming. I can't remember exactly what position he was in.

Q. He was either on the deck of the barge or he was over the coaming of the hatch?

A. Yes.

Q. And were you worried that the barge might come in from that point and strike his head against it, or his back or some part of his body against the outside of the lower platform of the gangway?

A. Yes. It was to avoid that that I hollered down, 'Don't pull any more.'

Q. Which man was pulling; was it Nelson or Nordfonn?

A. I'm not one hundred per cent sure, so I don't know.

Mr. Gerhardt. If you have a recollection, Captain, you can give it.

The Witness. Well, I would think it was Nordfonn. But I am not sure. . . .

Q. What was this man doing when he was pulling on the rope? Was he doing that to get the barge near the ship so he could scrape easier?

A. No. In my opinion it was to get the barge in so it was easier to get off the gangplank onto the barge.

Q. But the man had not been told that by you?

A. No.

Q. Or by the first officer?

A. Not to my knowledge. The way I recall it was that somebody started to pull the barge in as they saw us coming and got ready to come ashore.

Q. Because at that time the barge was out from the side of the ship?

A. That is the picture I have. I don't know if it was outside when Mr. Marshall jumped.

Q. You don't know where the barge was in relation to the side of the ship at the time Mr. Marshall jumped?

A. No." (SD 17-21.)

Now the captain could not have imagined and could not have been mistaken about incidents of this sort. They must have occurred just as he related them. And since they occurred, we must believe that when Marshall jumped Nelson was not where he placed himself, about twenty feet from the platform, but that he was on the after part of the barge, let us say about seventy-five feet from the platform at that time; that when Marshall and the captain were coming down the gangway, one of the men—the captain's best recollection was that it was Nordfonn—began pulling on the line from the after end of the barge to the ship to bring the barge in nearer to the ship; and that after Marshall had jumped and was standing on the deck of the barge, the captain hollered to the man who was pulling on the line to stop pulling because he was afraid that the lower platform of the gangway would strike Marshall as the barge was being brought in towards the side of the ship.

The sharp and material contradictions in the testimony of respondent's witnesses are obvious and extraordinary.

Nelson testified that he and Nordfonn were in the forward part of the barge; Nordfonn, Kaldefoss and the captain said that they were in its after part.

Nelson said that Nordfonn was right alongside of him, a meter or half a meter away. Nordfonn and Kaldefoss said that Nelson and Nordfonn were widely separated and the captain said that when he and Marshall were coming down the gangway one of them, he believed it was Nordfonn, was at the very end of the barge pulling on the line.

Nelson said that Marshall did not reply to his call; but Nordfonn said that Marshall did reply. If Marshall had replied the captain would have heard him; but since the captain did not testify that Marshall answered Nelson, the captain's testimony in effect corroborated Marshall in this respect. Since Nordfonn, according to the captain's best recollection, was the one pulling on the rope, he was about ninety feet from Marshall when the latter was on the lower platform of the gangway; and in any case he must have been at least sixty-five feet away; and so even if Marshall had replied (which he did not), Nordfonn would not have heard him. Since Nelson was the one who called and was the one nearer Marshall and since he spoke some English (he testified only in part by an interpreter, whereas Nordfonn gave all his testimony by an interpreter), his testimony that Marshall did not reply (corroborated as it is in effect by the captain) must be accepted.

Marshall was a truthful and accurate witness. As he was the one who had suffered the injury, his

memory of what happened was naturally more vivid than that of any of the other witnesses. His account of what took place, except whether he heard Nelson's warning, was not contradicted by any of the respondents' witnesses, on the contrary it was corroborated by respondents' witnesses. As will appear later, when he was asked whether he had admitted that the accident was his fault, he candidly replied that he had. He was not impeached in any way and he must be taken to be what he is, an honest and truthful man.

It is true that one cannot be definite in stating in feet the position of Nelson and Nordfonn on the barge as though one were actually measuring a distance to definitely established points; and that Kaldefoss, Nordfonn and the captain were each rather vague in indicating on Exhibit A the position of the men on the barge; but it is also true that each of them placed the men in the after part of the barge, and that the captain testified, in a circumstantial manner which we must believe, that one of them, Nordfonn he believed it was, was at the extreme end of the barge pulling on the line that tied the barge to the ship.

It is also true that the barge was one hundred feet long, and that it was established without contradiction by the evidence and so found by the court that the lower platform of the gangway was opposite that part of the forward end of the barge which was forward of the forward hold; that is, that it was about ten feet from the forward end of the barge.

Since the barge was one hundred feet long and since the lower platform was only about ten feet

from its forward end and since the men were in the after part of the barge, they must have been from about sixty-five to ninety feet from the lower platform, a very substantial distance.

The events leading to the accident took place in a brief space of time. When Marshall arrived on the lower platform of the gangway he tarried a few seconds to find out whether the captain, who was behind him, would give him any direction; but when the captain said nothing (tacitly directing him to jump), he did jump. He did not stop on the lower platform and look about him. He had his mind fixed on descending the gangway and making the difficult jump.

As we have stated, we must infer that neither Kaldefoss nor the captain heard Nelson's warning. Why then should Marshall whose attention must have been much more absorbed by what he was doing than that of either Kaldefoss or the captain?

Since the clear weight and preponderance of the evidence shows that Nelson and Nordfonn were on the after part of the barge, sixty-five to ninety feet from the lower platform, and since the events leading up to the accident occurred in a brief space and Marshall was necessarily concentrating on descending the gangway and making his jump, there was no ground for the court to reject his testimony that he did not hear Nelson's warning and to infer that he did.

Our first conclusion with respect to this phase of the case is the same as that stated by us in considering

the findings; that is that Marshall cannot be charged with negligence because he used the means of disembarking which the captain in effect furnished him and directed him to use.

Our next point is this. As stated, the admiralty rule is that on an appeal there is a trial de novo, but that the appellate court will usually accept the findings of the trial court unless such findings are clearly against the weight or preponderance of the evidence. We submit that the clear weight and preponderance of the evidence show that Marshall, while he was concentrating on the jump he was about to make, did not hear Nelson call to him and that the court's finding that he did is clearly erroneous.

And finally we submit that if we assume for argument's sake that Marshall did hear and ignore Nelson's call, it does not show any negligence on his part. If Marshall did hear Nelson's warning (which we emphatically deny), the situation was this: the master of the ship, the captain, who was behind him and so must also have heard Nelson's warning and who was charged with the primary responsibility of protecting him and had in effect furnished him with the means of disembarking which he was using, was tacitly directing him to ignore the warning and to jump; whereas Nelson, a sailor, engaged in work on the barge, who owed him no duty, was telling him not to jump. He, not knowing what the pitch of the sea could do to him, used the means of disembarking with which he had been furnished and followed the

captain's tacit direction and jumped. *He cannot be charged with negligence in so acting.*

D. MARSHALL'S ADMISSION DOES NOT PRECLUDE MARSHALL'S RECOVERY OR SHOW THAT HE WAS NEGLIGENT.

The court found that Marshall admitted to the captain and the first officer "that the accident was his fault" (R 15).

Marshall testified:

"Q. Now, Mr. Marshall, will you tell me about the conversation you had with the Captain after you returned to the vessel in which the matter of fault was discussed?

A. Well, you have that all in my deposition. When we came back to the ship and I was in bed in my cabin, the Captain came by to see me, as he did often after that, and I felt he was worrying a great deal about it, and I didn't know how badly hurt I was, and we had about ten days to go through the Straits, and I said, 'Don't worry. Don't give it a thought. I feel it was my fault.'

Q. And did you make that statement to him more than once?

A. I don't think so, but if I did I will certainly stand behind it.

Q. Did you make the same statement to the Chief Officer?

A. Yes, I did.

Q. And along about the same lines as this conversation with the Captain?

A. Yes, I said I didn't want him to worry, that I thought it was my fault.

Q. Did you at the same time make any reference to the fact that you weren't quite as young as you thought you were, or any other comment about the circumstances?

A. Oh, yes, I could have very likely said that, and I am willing to say that I did say it.

Q. Mr. Marshall, about when did you have any conversation with the Captain? How long after the accident?

A. Oh, I think, as I recall, it was the night I came back from Valdivia and I was in the cast in my cabin.

Q. When was it that you made a similar statement to the Chief Officer?

A. I don't know for sure, but I would think either that night or the next morning." (R 74-75.)

The captain testified that Marshall had told him in Marshall's cabin—he could not recall when the conversation took place—that "it was his own fault"; that "it had nothing to do with you." (SD 11.)

Kaldefoss testified that he had a conversation with Marshall in the latter's cabin in the evening of the day of the accident in which Marshall said: "It's my own fault. I thought I was younger than I am." (KD 13.)

In *The Ocracoke,* supra, the Libelant after his injury stated that he was to blame for the accident. The court in dealing with this part of the case said:

". . . These statements are not entitled to great weight, especially when they are introduced to impeach the evidence of thoroughly reliable wit-

> nesses. The Supreme Court of the United States in Coasting Co. v. Tolson, 139 U.S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, stated to some extent its view of this class of testimony, and the court can but feel that employees of corporations frequently weaken, instead of strengthen, their cases in the vigilance displayed in procuring evidence of this character, at a time when the humanities of the case would appear to call for sympathy for the injured persons, rather than to commit them to statements that would deprive them of what might be their just dues."

But there is a more conclusive answer so far as this testimony of Marshall is concerned. When Marshall made these statements to the captain and the first officer, he did not know the extent of his injuries, nor the duties respondent owed him, or his rights against respondent. He was just trying to do what was kind under the circumstances, that is, to allay any anxiety the captain and first officer might feel.

But since the respondent as a matter of law is liable to Marshall, the latter's statement to the captain and first officer was simply a statement of an erroneous legal conclusion and cannot be used to support the court's finding that Marshall was negligent.

In 31 C.J.S. 1186, the textwriter says:

> ". . . However, a mere acknowledgment of fault or liability is insufficient to establish the same if there is no liability or actionable fault present as a matter of law, as where such admission is made in ignorance of declarant's rights and responsibilities. Similarly plaintiff's statement at the

time of the incident, that defendant was not at fault, is not conclusive so as to preclude recovery, such statement being as to a question of law. Nevertheless such an admission of fault coupled with facts which may constitute liability in law may be sufficient to support a finding of liability."

See also:

McClusky v. Duncan, 216 Ala. 388, 113 So. 250, 252;

Parker v. Employers' Casualty, 152 So. 373 (La. App.);

Robb v. Pike, 119 Fla. 833, 161 So. 732, 733.

E. EVEN ASSUMING FOR ARGUMENT'S SAKE THAT MARSHALL WAS NEGLIGENT, HE UNDER THE ADMIRALTY DOCTRINE OF COMPARATIVE NEGLIGENCE IS NEVERTHELESS ENTITLED TO RECOVER.

The common law doctrine of contributory negligence, which bars recovery where the plaintiff has been guilty of negligence contributing to the accident, does not apply to suits in admiralty like the case at bar. In this suit, the admiralty doctrine of comparative negligence applies. Under this doctrine where a passenger on a vessel has been injured by the vessel's negligence and where the passenger himself has been guilty of negligence contributing to his injuries, the court may divide the damages, or apportion them, according to the degree of fault. *The Max Morris,* 137 U.S. 1, 11 S. Ct. 29; *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 74 S. Ct. 202; *The Tourist,*

265 Fed. 700 (D. Me.); *The Lackawanna,* 151 Fed. 499 (S.D. N.Y.); *Byrd v. Napoleon Ave. Ferry Co.,* 125 F. Supp. 573 (E.D. La.), aff'd., 5 Cir., 227 F. 2d 958, cert. denied, 351 U.S. 925; and 2 C.J.S. 167.

Respondent did not contend in the trial court that this doctrine was not applicable to this case as a matter of law; but it contended that it was not applicable as a matter of fact because Marshall's injuries were not caused in any way by its negligence or that of its master and crew, but solely by his own; and the trial court so found.

Assuming for argument's sake that Marshall was negligent, the court's finding that respondent and its master were not guilty of negligence is contrary to both the court's findings of specific facts and the uncontradicted evidence.

It follows that Marshall is entitled to recover a proportion of his damages even if we assume his negligence, an assumption not supported by the record.

F. ALTHOUGH THE EXTENT OF MARSHALL'S DAMAGES IS NOT AN ISSUE ON THIS APPEAL, IT SHOULD BE REMEMBERED THAT HE SUFFERED A SEVERE AND PAINFUL INJURY.

We have already mentioned Marshall's testimony that while he was going to Valdivia with the captain his knee was constantly getting bigger until it became the size of a large cauliflower; and that after he had been taken to the hospital at Valdivia the doctor there

aspirated the blood which had collected on his knee and put a cast on his knee and that he then returned to the ship.

He also testified that when he got back to the ship he was carried aboard because he could not walk up the gangway; that he remained in his cabin until the ship arrived at Buenos Aires, except that he was able to get out on the deck occasionally for about an hour (R 51-52); that he left the ship at Buenos Aires and remained there for fourteen days waiting to get a reservation on an airplane to return home; that while he was there the blood was twice aspirated from his knee (R. 53, 57); that he flew from Buenos Aires to San Francisco, arriving at the latter place on March 1st, where he consulted with Dr. King of Stanford Hospital (R 53, 57-58) and that Dr. King operated on his knee a few days after his arrival in San Francisco (R 58); that his knee was most painful, particularly when the blood collected in it during the period from the date he hurt it at Corral until he was operated on (R 57); that after the operation, the knee ceased to bleed and ceased to swell, but he then suffered the post-operative pain and the pain inflicted in the physiotherapy which he had to undergo (R 58-59); and that his knee is now a barometer for weather and sore to the touch, but he has no other pain in it and can use his knee as he did before the accident (R 59-60).

Marshall expended $1,218.43 to pay the hospital and doctors and other incidental expenses connected with his treatment and also about $100.00 to $125.00 to pay

the cost of nurses and doctors while he was on the ship and in Buenos Aires (R 60-61).

Dr. King testified that in the accident Marshall had torn apart a ligament of the knee called the anterior cruciate ligament (as shown by Exhibit 5 for identification, this ligament is one of the big ligaments in the knee) and that in the operation he stitched the torn ligament together. (R 106-109.)

The injuries Marshall suffered as a consequence of the flagrant breach by respondent and its master of the duties owed by them to Marshall were severe. It is simple justice that he be compensated for them.

V. CONCLUSION.

We respectfully submit that since both the trial court's findings and the uncontradicted testimony establish that Marshall is entitled to recover, this court should reverse the judgment with directions to the lower court to determine the amount of Marshall's damages and to enter judgment for him for that amount.

Dated, San Francisco, California,
October 28, 1957.

Respectfully submitted,
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